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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re Marriage of THERESE ANNE and S.  
SCOTT KOSTKA.

B217401

(Los Angeles County Super. Ct.  
No. GD038022)

S. SCOTT KOSTKA,

Appellant,

v.

THERESE ANNE KOSTKA,

Respondent.

APPEAL from a judgment of the Superior Court of Los Angeles County, Nori Anne Walla, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

S. Scott Kostka, in pro per, for Appellant.

No appearance for Respondent.

Appellant Steven Scott Kostka (Husband) appeals from a postjudgment order granting his petition for modification of an earnings and assignment order for spousal support payable to his former wife Theresa Kostka (Wife).<sup>1</sup> Husband contends the trial court abused its discretion by excluding him from the family dwelling and by failing to consider all of the statutory factors in modifying the spousal support order. We conclude that permission to enter the family dwelling is not reviewable by way of this appeal. Moreover, the trial court did not abuse its discretion in modifying the spousal support order. Therefore, we affirm.

### **FACTS AND PROCEDURAL BACKGROUND**

The parties were married on June 21, 1986. They do not have children. After a marriage of 19 years, Wife filed a petition for dissolution in July 2005. A judgment of dissolution as to marital status was entered on August 31, 2006. The parties filed income and expense declarations in October 2006 and entered into an oral stipulation resolving the majority of their property issues. A two-day trial commenced on October 25, 2006, on the issues of spousal support and attorney fees. On February 7, 2007, the trial court issued a written memorandum of decision which discussed the relevant spousal support factors set forth in Family Code section 4320. The court ordered Husband to pay spousal support of \$2,900 per month to Wife until her death, remarriage, or further order of the court. The court also ordered Husband to pay \$15,000 to Wife's attorney for her attorney fees.

On March 20, 2007, Husband filed an ex-parte application requesting assistance from the trial court in resolving issues about community property furnishings located at the Duarte residence in Wife's possession. Husband requested that the court provide each party access to the other party's residence or require the parties to have appraisals

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<sup>1</sup> Wife has not filed a respondent's brief in this appeal. Husband's motion to augment the record on appeal filed March 11, 2010, is granted.

prepared. The court denied the ex-parte application without prejudice to file an order to show cause with statutory notice to resolve the property issues. However, Husband does not appear to have filed an order to show cause to resolve these issues.

On June 11, 2007, the trial court entered judgment on the reserved issues, including the spousal support award. In accordance with the parties' agreement, Wife was awarded the community's interest in a residence in Duarte, while Husband was awarded the community's interest in a residence in Alhambra. Wife was also awarded half of the community interest in Husband's retirement benefits. The judgment ordered the parties to meet and confer as to the division of household furnishings, furniture, and appliances, but in the event that the parties could not agree, the court retained jurisdiction over division of these items.

On February 28, 2008, Husband filed an application for an order to show cause for modification of the spousal support order. In addition, he requested reimbursement of his share of the community property furnishings that Wife disposed of as part of a sale of the Duarte residence. He estimated that Wife had possession of community furnishings valued at \$7,725, while he had possession of furnishings valued at \$2,490. He requested that the trial court order Wife to pay \$2,617.50 to him as an equalizing payment. He also requested a decrease in the amount of monthly spousal support. Husband filed an income and expense declaration.

A hearing was held on April 29, 2008. The trial court issued a memorandum of decision on November 17, 2008. With respect to the community furnishings, the court ordered Wife to make an equalization payment of \$2,617.50 to Husband, as requested by Husband. The court considered each of the factors set forth in Family Code section 4320 pertinent to modification of the spousal support order. The court found a material change of circumstances occurred after the spousal support order was entered, in that Husband was now liable for an installment debt of \$13,000, Wife had reduced her living expenses by moving to a guest house on her mother's property, Husband's unreimbursed health expenses had doubled, and Wife had an additional \$1,085 per month in interest income as a result of liquidating her share of the community property. The court additionally found

that Husband's earning capacity had not been diminished despite health problems, but Wife's health issues had increased and it appeared unlikely that she could ever maintain employment. The court further found that Wife's significant cash holdings resulted from liquidation of her share of the community property, while Husband had an equal share of community property held in the form of real property and retirement benefits. The court granted Husband's request to modify the spousal support order and reduced the amount of support to \$2,700 per month. In addition, the court ordered Husband to contribute \$2,500 to Wife's attorney fees. The court directed Wife to prepare and circulate a proposed order after the hearing and Husband was permitted to file objections.

Instead, Husband filed objections to the memorandum of decision on December 8, 2008. The trial court provided Wife an opportunity to respond. The court apparently treated Husband's objections as a motion for reconsideration. On April 6, 2009, Husband filed a supplement declaration regarding the motion for reconsideration. After a hearing on April 28, 2009, the court denied the motion for reconsideration. Husband filed a notice of appeal from the April 28, 2009 order on June 29, 2009.

## **DISCUSSION**

### **Exclusion from the Family Dwelling Under Family Code Section 6321**

Husband devotes a substantial portion of his brief on appeal to his contention that the trial court erred by excluding him from the family dwelling under Family Code section 6321. However, the order modifying spousal support does not contain any provision excluding Husband from any dwelling. Therefore, Husband's contention is not reviewable as part of his appeal from the postjudgment order modifying the spousal support order.

In fact, the record on appeal shows that the parties stipulated to Wife's exclusive possession and control of the family dwelling and there is no evidence in the record that Husband objected to this arrangement. Although the trial court gave Husband permission

to file an order to show cause requesting access to the family dwelling to appraise community property furnishings, he does not appear to have complied. Instead, Husband filed an order to show cause for modification of the spousal support order that requested a specific amount to equalize the division of community property furnishings, which the court granted. Husband's contention concerning an exclusion order has no merit.

### **Modified Amount of Spousal Support Order**

Husband contends the trial court should have further reduced the amount of spousal support. We find no abuse of discretion.

A party seeking modification of a spousal support order has the burden of showing a material change of circumstances since the previous order. (*In re Marriage of Tydlaska* (2003) 114 Cal.App.4th 572, 575.) A “change in circumstances” means a reduction or increase in the supporting spouse’s ability to pay and/or an increase or decrease in the supported spouse’s needs; it includes all of the factors affecting the need and the ability to pay. (*In re Marriage of West* (2007) 152 Cal.App.4th 240, 246.) “A trial court considering whether to modify a spousal support order considers the same criteria set forth in Family Code section 4320 as it considered in making the initial order. [Citations.]” (*Id.* at p. 247.) The factors set forth in Family Code section 4320<sup>2</sup> include

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<sup>2</sup> Family Code section 4320 provides that the court must consider all of the following circumstances in ordering spousal support: “(a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following: [¶] (1) The marketable skills of the supported party . . . . [¶] . . . [¶] (c) The ability of the supporting party to pay spousal support, taking into account the supporting party’s earning capacity, earned and unearned income, assets, and standard of living. [¶] (d) The needs of each party based on the standard of living established during the marriage. [¶] (e) The obligations and assets, including the separate property, of each party. [¶] (f) The duration of the marriage. [¶] . . . [¶] (h) The age and health of the parties. [¶] . . . [¶] (j) The immediate and specific tax consequences to each party. [¶] (k) The balance of the hardships to each party. [¶] (l) The goal that the supported party shall be self-supporting

an examination of the needs of the parties, their respective abilities to meet those needs, the length of the marriage, and the age and health of the parties. “[T]he trial judge must both recognize and *apply* each applicable statutory factor in setting spousal support.” (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 304.)

We review an order modifying spousal support for an abuse of discretion. (*In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 47.) “In exercising its discretion the trial court must follow established legal principles and base its findings on substantial evidence. If the trial court conforms to these requirements its order will be upheld whether or not the appellate court agrees with it or would make the same order if it were a trial court.” (*Ibid.*) Discretion is abused when the order exceeds the bounds of reason, when it can fairly be said that no reasonable judge would have made the same order under the circumstances. (*In re Marriage of Bower* (2002) 96 Cal.App.4th 893, 898-899.) An abuse of discretion will be found where there is no substantial evidence to support the order. (*In re Marriage of McCann* (1996) 41 Cal.App.4th 978, 982-983.)

In this case, the trial court carefully and extensively considered all of the relevant factors. Substantial evidence supports the trial court’s findings. The court found that following the lengthy marriage, Wife’s earning capacity was impaired by her health and her periods of unemployment during which she attended to domestic duties. The court concluded that Husband has the ability to pay spousal support and continue to live a middle class lifestyle based on his earning ability and monthly salary of \$9,203.85, his assets and debts, including an installment debt of \$13,000, and his monthly expenses of \$6,703, including monthly expenses of \$907 for unreimbursed medical bills.

Husband has not identified any relevant statutory factor that the trial court did not expressly consider. Husband contends the court should have relied on his average monthly income of \$8,873.15, rather than his salary for the prior month. However, the first page of Husband’s income and expense declaration clearly states that Husband’s

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within a reasonable period of time. . . . [¶] . . . [¶] (n) Any other factors the court determines are just and equitable.”

gross salary is \$9,203.85 per month. There is no evidence that Husband will earn less than \$9,203.85 per month in the future. The court properly used the amount of Husband's current monthly salary rather than an average monthly amount under these circumstances.

The trial court also expressly considered the expenses and obligations listed in Husband's income and expense declaration that Husband claims the court did not consider, including Husband's expenses associated with his mother's health in balancing the hardships to each party. The court noted that Wife's cash assets resulted from the liquidation of her share of community property which was divided equally between the parties and was not a changed circumstance. It is clear that Husband had the ability to pay spousal support and Wife has a continued need for support. Husband would have us weigh the relevant factors differently. Husband has not demonstrated an abuse of discretion in the trial court's order modifying the spousal support order.

### **DISPOSITION**

The April 28, 2009 order is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.